Episode 5 of the Celmer Saga – The Irish High Court Holds Back

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When we last left the now notorious and long-running *Celmer* saga, the High Court of Ireland in its fourth outing had held that it needed to ultimately determine if there were substantial grounds for believing that Mr Celmer was at real risk of a breach of his fundamental right to an independent tribunal. To do that, the Court had to elicit additional information from the Polish judicial authorities and enter into dialogue with them in order to obtain further information about this risk. On 19 November 2018, in what now appears to be the final outing before the High Court of Ireland, subject to any appeals that may flow from the decision, Donnelly J gave her fifth judgment and concluded that the real risk of a flagrant denial of justice has not been established by Mr Celmer and ordered that he be surrendered on foot of the European Arrest Warrants (EAWs) issued against him. Given that Donnelly J had, as a matter of fact, initially found that there were 'breaches of the common value of the rule of law' in *Minister for Justice and Equality v Celmer* (No 1) [2018] IEHC 119, this came as some surprise.

The Legal Tests

As set out in her judgment, Donnelly J had requested further information from the issuing judicial authorities in Poland pursuant to Article 15 of Council Framework Decision 2002/584/JHA. The issuing judicial authority was asked that they would comment specifically on a number of contentious issues, including the general situation of the rule of law in Poland, the removal of presidents and vice-presidents of the Ordinary Courts in general and specifically, the remarks of the Deputy Minister for Justice relating to the Respondent, and what effect, if any, the removal of the court presidents might have on the trial of Mr Celmer. On this basis, Donnelly J had to make a factual determination on all the information and evidence before her, in accordance with the principles set out in Case C-216/18 PPU *LM*.

Initially, Donnelly J dealt with some housekeeping matters, of interest in the practical implementation of *LM,* such as the relevant legal and evidential tests to be applied when establishing the extent and degree of the denial of a fair trial. She held that the applicable standard was that of a flagrant denial of justice, as set out in *LM* and that the burden of proof in establishing substantial or reasonable grounds giving rise to a real risk rests on the Respondent. Given the primacy of mutual trust within the Framework Decision and the CJEU's conclusion that it is only in exceptional cases that a check can be made on whether fundamental rights have been breached, this was a high threshold. The fundamental overarching question to be factually determined was if systemic deficiencies in the common values of the rule of law arising from a lack of independence of the judiciary are found to exist and if – following a specific and precise assessment into the particular circumstances of the

case – there are substantial grounds for believing that the Respondent would be at risk of an unfair trial.

Systemic Deficiencies

Donnelly J began by examining whether systemic deficiencies in and of themselves could amount to a flagrant denial of justice. Specifically, she found that it was clear that the CJEU in *LM* expressly did not accept that a finding of systemic and generalised breaches was sufficient to establish that the individual concerned will run the risk of a breach of the essence of the fundamental right to a fair trial. This was copper-fastened in her view by the CJEU's statement that even if the deficiencies are found to operate systemically, the executing judicial authority was still required to assess specifically and precisely whether there were substantial grounds for believing that the person in question will run a real risk of breach of his fundamental right to a fair trial. Both Donnelly J's and the CJEU's reasoning here seems coherent – as Donnelly J set out the test is one of the essence of the fundamental right to a fair trial. In circumstances where such systemic and generalised breaches were so egregious, it would be likely an individual could establish they were individually affected. Where this is more nuanced and less clear, given the threshold of mutual trust between Member States, a precise and individual assessment must be mandated.

Donnelly J then proceeded to examine the submissions and additional information provided by the issuing authority. Most interesting and marked were the contrasting replies from the issuing authorities, from President of the Warsaw Regional Court Judge Joanna Bitner and from Judge Piotr Gaciarek, named on the warrant issued by the Warsaw Regional Court as the representative of the issuing judicial authority. There is a clear dispute between Judges Bitner and Gacierek as to who is to represent the Warsaw issuing authority, and, as Donnelly J pithily notes, the dispute only highlights the considerable tensions that the recent legislative changes have wrought amongst the Polish judiciary. In short, Judge Bitner provides the statist position, submitting that amongst other points, there is no risk of a violation by Polish courts of the guarantee of a fair trial. On the other hand, Judge Gaciarek asserts that it is not true that there are no risks for independence of judges and courts in Poland and his concerns mirror those of the EU Commission.

Specific and Precise Assessment

With these considerations in mind, Donnelly J finally came to deciding whether the Respondent had met the threshold of the test set out in *LM.* First, she concluded that in light of evidence before her, there was a real risk of the fundamental right to a fair trial being breached, based on the lack of independence of the courts of Poland on account of systemic or generalised deficiencies there. Next, she examined if the Respondent himself would face a flagrant denial of justice due to the general situation in Poland, due to the serious charges he faced, and due to the specific comments of the Deputy Minister of Justice.

In relation to the general situation in Poland, Donnelly J reiterated her initial observations on systemic and generalised risks being insufficient to ground a real risk. She further buttressed this point with reference to the absence of available qualitative or anecdotal evidence on the lack of fairness since the changes, regardless of those changes themselves. She however rejected the Respondent's contention in relation to the nature of his charges on the same basis. Finally, she turned to the comments of the Deputy Minister of Justice, where he made prejudicial comments referring to the Respondent as "a dangerous" "criminal sought in the whole of Europe" "from a drug mafia". This was arguably the Respondent's strongest and most individualised argument. On the basis of the information from the Polish judiciary, Donnelly J noted that statements of public officials were not to be taken into account in the decision making process. Both Judges Butner and Garcierek had highlighted how such comments appear to be a regular occurrence In Poland "on almost a daily basis" and, according to Judge Garcierek, "should be perceived as a typical rhetoric of politicians currently in power, who build their position among voters based on illegitimate and unjust attacks on courts and judges." However, despite this Donnelly J continued that in light of all the evidence the Deputy Minister of Justice's comments did not give rise to a real risk that this respondent will face a flagrant denial of his right to a fair trial. It was the, somewhat perversely, normalisation of what in many jurisdictions would be considered deeply prejudicial comments that ameliorated their potential adverse effect.

What Next?

Finally, Donnelly J notes that the execution of EAWs is a matter of applying Union law and not of applying Polish law. It is the mutual trust that each Member State places in another Member State's sharing of common values on which the EU is founded. However, the right, and indeed the duty in certain circumstances, for a court to examine whether a requested person can receive a fair trial in a Member State has been confirmed by the CJEU. And where the test in *LM* is met the executing judicial authorities may not be bound by the principles of mutual trust.

Possibly the most interesting statement of all was in the very last paragraph of the lengthy judgment, which may perhaps give pause for thought to the Polish authorities and the Respondent and it is worth quoting in full:

Finally, it is important to state that it is the courts of Poland and, perhaps if he were to be convicted and have that conviction upheld on appeal, the European Court of Human Rights, that will have to decide whether any trial of this respondent actually meets the Polish and ECHR standards respectively of right to a fair trial before an independent and impartial judiciary. This Court has been concerned only with whether the relevant threshold preventing surrender has been reached, in accordance with the principles laid down by the Court of Justice of the European Union. That threshold, which is a high one under the law of extradition/surrender, has not been reached on the evidence before this Court.

As noted before, and as Matteo Bonelli has written, the Irish proceedings really are only the starter, with the pending infringement actions (on the Ordinary

Courts and on the Law on the Supreme Court) and the proceedings under Article 7 TEU as the main course. This decision has avoided the ensuing diplomatic fallout and the potential for EAW transfers between Poland and Ireland to grind to a halt only for now. But, as noted in her final paragraph, Donnelly J was only concerned with the high threshold set in *LM* on the prevention of surrender, not with whether the Respondent's trial substantively meets the requirements of Article 6 of the ECHR. Any proceedings that the Respondent may wish to take to the European Court of Human Rights, should he be convicted, may well provide the dessert.

The judgment is compelling for a number of reasons, not least in that it averts a collision between Member States for now, but primarily for the glaring disparateness between the factual findings of the Court in relation to the rule of law in Poland initially in *Celmer* (No 1) and its final determination. Fairly, it is quite a faithful application of the test in *LM* and any critique of the case in relation to the test should more appropriately be levelled at the CJEU. The High Court decision vindicates in a way the purposely difficult standard created by the CJEU as a means of avoiding any direct confrontation between the political process envisaged under Art. 7 TEU and the role of the Court. That said, the judgment is somewhat disappointing insofar as it arguably fails to vindicate the Respondent's fair trial rights and begs the question what exactly would it take for the threshold of the Framework to be met if the terms of the Polish judicial changes do not? Perhaps however, Donnelly J is savvy to allow this issue to be ultimately resolved by the ECtHR – this would facilitate a more neutral arms-length determination of the rule of law issues without inflaming the internal politics of the Union.
